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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)

E14.2-10817-US02

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on June 26, 2006

Signature 

Typed or printed name Elizabeth A. Deutsch

Application Number

10/664265

Filed

9/17/2003

First Named Inventor

Michel Lawrence

Art Unit

1751

Examiner

Charles I Boyer

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

applicant/inventor.

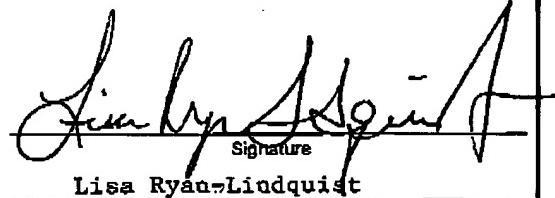
assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)

attorney or agent of record.

Registration number 43071

attorney or agent acting under 37 CFR 1.34.

Registration number if acting under 37 CFR 1.34



Signature

Lisa Ryan-Lindquist

Typed or printed name

952-563-3011

Telephone number

June 26, 2006

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.
Submit multiple forms if more than one signature is required, see below*.



*Total of 6 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.8. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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Filed: September 17, 2003

REASONS FOR PRE-APPEAL REQUEST FOR REVIEW

Claims 43-52 are pending in the application. Claims 53-57 have been withdrawn.

In the response to the last Office Action mailed April 19, 2006, Applicants' presented unexpected and surprising results to rebut obviousness rejections of the instant claims over Cords et al., U.S. 6,554,005; Peters et al., U.S. 6,090,860; and Man et al., U.S. 6,838,422 in view of Rossio. Applicants demonstrated in the specification, superior cleaning and protection of polyethylene terephthalate (PET) achieved with compositions including alkyl diphenyl oxide disulfonate surfactants as recited in claims 43 and 51.

In the Advisory Action mailed 5/01/05, the Examiner properly withdrew the obviousness rejection over Cords et al., but incorrectly maintained the rejections over Peters et al. and Man et al. stating that "...applicants' argument of unexpected results is persuasive with respect to the Cords et al. reference, but is not sufficient to overcome the other prior art rejections. The Peters and Man references both teach alkyl diphenylene oxide disulfonates as particularly preferred surfactants of their invention."

Applicants now respectfully request that the rejections of the claims based on Peters et al. and Man et al. in view of Rossio, be withdrawn. The showing of unexpected and surprising results is sufficient to overcome a *prima facie* case of obviousness with respect to the rejections over Peters et al. and Man et al. in view of Rossio made in the Final Office Action mailed 3/01/06, for the same reasons that it was sufficient to overcome the rejection of the claims over Cords et al. Peters et al. and Man et al. use the word "preferred" with respect to so many different embodiments and so many different surfactants, that one of skill in the art is still left to choose from a large selection of surfactants, believing that each preferred surfactant performs equivalently. This is not the case. Therefore, Applicants submit that the showing of unexpected and surprising results is still sufficient to overcome a *prima facie* case of obviousness with respect to Peters et al. and Man et al. just as it was to overcome the rejection over Cords et al.

Applicants submit that Peters et al. disclose methods of recycling, and compositions used therein, wherein a coating is separated from a base plastic in a multilayered structure. See Abstract. Applicants submit that the recycled polymer of Peters et al. is flaked, and then extruded into polymer articles (col. 1, lines 57-66).

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The present invention, on the other hand, is directed to cleaning and protecting PET containers which will be *reused*. For this, not only must the PET be clean and clear, but hazing and stress cracking are also undesirable. Peters et al. make no suggestion that the compositions disclosed therein be employed for cleaning and protection of PET containers to prevent hazing and stress cracking. Therefore, there is no suggestion by Peters et al. to select surfactants wherein such results can be obtained.

The mixture disclosed by Peters et al. includes a major amount of water, at least one basic compound or acid compound, at least one lifting agent, and at least one accelerator. See Abstract. Peters et al. disclose many preferred lifting agents.

The lifting agent is preferably any compound capable of lifting one polymer layer away from another polymer layer. In a preferred embodiment, the lifting agent is a surfactant.

Column 8, lines 61-64.

In a preferred embodiment, especially the embodiments involving a basic compound, the lifting agent is an anionic surfactant or a cationic surfactant. In another embodiment, the lifting agent is a fluorocarbon surfactant, and preferably, an anionic fluorocarbon surfactant

In a preferred embodiment, especially the embodiments involving an acid compound, the lifting agent is a nonionic surfactant. In another embodiment, especially the embodiments involving an acid compound, the lifting agent is an alkoxylated alkylaromatic surfactant.

Column 9, lines 20-30

In various preferred embodiments, Peters et al. include anionic sulfosuccinate surfactants or derivatives thereof (col. 9, lines 51-52), anionic modified ethoxylate surfactants (col. 9, lines 61-62), anionic phosphate ester surfactants where the ester hydrocarbyl moiety each independently contains 1 to about 24 and preferably 1 to about 12 carbon atoms, potassium salt of a phosphate ester (col. 10, lines 31-36), anionic alkyl naphthalene sulfonate surfactant (col. 10, lines 48-49), anionic diphenyl sulfonate surfactant or a hydrocarbyl substituted derivative thereof where the hydrocarbyl group contains 1 to about 24 and preferably 1 to about 12 carbon atoms (col. 10, lines 57-61).

Applicants submit that Peters et al. used the words "preferred" or "preferably" no less than nineteen times with respect to the lifting agent. Applicants submit that the expectation is that all of these "preferred" surfactants perform equivalently. They do not.

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Applicants demonstrated in the specification that an anionic alkyl *naphthalene* sulfonate (comparative A) exhibited poor cleaning of PET and an alkyl phosphate ester (comparative C), exhibited poor cleaning and poor protection of PET, each "preferred" by Peters et al. In contrast, the alkyl diphenyl oxide disulfonates recited in Applicants' claims 43 and 51 exhibited *both* superior cleaning and superior protection of PET (examples 3 and 4, pages 13-17 and Fig. 1), a surprising and unexpected result.

It has long been recognized that secondary considerations, such as unexpected results, are relevant to the determination of obviousness or nonobviousness:

The patent statute provides that "[a] person shall be entitled to a patent unless" any of the Section 102 or 103 bars applies. 35 U.S.C. Section 102. When a chemical composition is claimed, a *prima facie* case of obviousness under Section 103 may be established by the PTO's citation of a reference to a similar composition, *the presumption being that similar compositions have similar properties*. See *In re Dillon*, 919 F.2d 688, 692, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990) (*en banc*) ("structural similarity between claimed and prior art subject matter,...where the prior art gives reason or motivation to make the claimed compositions, creates a *prima facie* case of obviousness"), cert. denied, 500 U.S. 904 (1991). One way for a patent applicant to rebut a *prima facie* case of obviousness is to make a showing of "unexpected results," i.e., to show that the claimed invention exhibits some superior property or advantage that a person of ordinary skill in the relevant art would have found surprising or unexpected. The basic principle behind this rule is straightforward -- that which would have been surprising to a person of ordinary skill in a particular art would not have been obvious. The principle applies most often to the less predictable fields, such as chemistry, where minor changes in a product or process may yield substantially different results.

Consistent with the rule that all evidence of nonobviousness must be considered when assessing patentability, the PTO must consider comparative data in the specification in determining whether the claimed invention provides unexpected results. *In re Margolis*, 785 F.2d 1029, 1031, 228 USPQ 940, 941-42 (Fed. Cir. 1986). However, "[i]t is well settled that unexpected results must be established by factual evidence. Mere argument or conclusory statements in the specification does not suffice." *In re De Blauwe*, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984); see also *In re Wood*, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978) ("Mere lawyer's arguments and conclusory statements in the specification, unsupported by objective evidence, are insufficient to establish unexpected results."); *In re Lindner*, 457 F.2d 506, 508, 173 USPQ 356, 358 (CCPA 1972) ("[M]ere conclusory statements in the specification...are entitled to little weight when the Patent Office questions the efficacy of those statements.").

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In re Soni, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995)(emphasis added). See also *In re Mayne*, 41 USPQ2d 1451, 1454 (Fed. Cir. 1997); *In re Woodruff*, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Rouffet*, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998).

Therefore, even though Peters et al. employed the word "preferred" with respect to these surfactants while Cords et al. did not, one is still left with the expectation that the "preferred" surfactants perform equivalently. They do not. Therefore, Applicants' showing of unexpected and surprising results is sufficient to rebut a *prima facie* showing of obviousness over Peters et al.

Applicants submit that Man et al. discloses for use in the plastics compatible detergent composition about 0.01 wt. % to about 10 wt. % anionic surfactant; about 0.01 wt. % to about 10 wt. % cationic surfactant; about 0.01 wt. % to about 10 wt. % of at least one of reverse polyoxyalkylene block copolymer surfactant, alcohol alkoxylate surfactant having polyoxypropylene and/or polyoxybutylene end groups, and mixtures thereof; about 0.01 wt. % to about 10 wt. % alkylpolyglycoside surfactant; and about 0.01 wt. % to about 20 wt. % silicone surfactant.

The compositions disclosed by Man et al. are for warewashing (Field of the Invention), not for cleaning and protecting reusable PET containers. There is no suggestion by Man et al. that the compositions disclosed therein provide cleaning and protection of PET in order to prevent hazing and stress cracking, nor is there a suggestion to select surfactants from their "preferred" list wherein such a result may be obtained.

Man et al. employ the word "preferred" no less than twenty-five times with respect to surfactants. For each category of surfactant, Man et al. disclose preferred surfactants: alkyl polyglucosides (col. 3, lines 16-41), reverse polyoxyalkylene copolymers (col. 4, lines 57-62 and col. 5, lines 35-65), alkoxylated cationic ammonium surfactants (co. 8, lines 12-31), silicone surfactants (col. 8, lines 61-67, col. 9, lines 1-67 and col. 10, lines 1-19), and anionic surfactants (col. 10, lines 36-67 and col. 11, lines 1-67). For anionic surfactants, Man et al. suggests the following:

...Preferred anionic surfactants are those that tend not to form insoluble complexes with calcium and magnesium....

Preferred anionic surfactants include that can be used according to the invention include sulfates, sulfonates and carboxylates.

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Preferred sulfate surfactants include alkyl sulfates and alkylether sulfates wherein the alkyl group includes between about 6 and 18 carbon atoms, and more preferably between about 12 and 14 carbon atoms. Particularly preferred sulfates include lauryl sulfate and laurylether sulfate.

Sulfonate surfactants that can be used in the detergent composition include monosulfonates and disulfonates. Particularly preferred sulfonates include alkyl benzene sulfonates, alkyl sulfonates, alkyl diphenylene oxide disulfonates, and alphaolefin sulfonates, wherein the alkyl group contains between about 6 and 18 carbon atoms and preferably between about 12 and 14 carbon atoms.

Column 10, lines 36-67

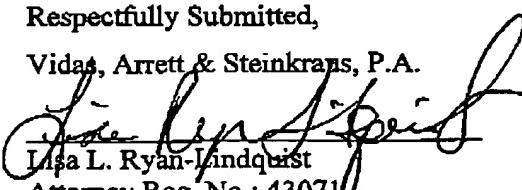
Again, one would expect comparable performance of the preferred surfactants. This is not the case. Applicants tested two monosulfonates: sodium naphthalene sulfonate (comparative A) which exhibited poor cleaning, and sodium xylene sulfonate (comparative D) which exhibited both poor cleaning and poor protection of PET. Other surfactants preferred by Man et al. include GENAPOL PN 30 (col. 4, lines 44-67, col. 5, lines 1-16, col. 6, lines 50-57 and Table 2 in col. 7) (Applicants' comp F exhibiting poor protection of PET) and an alkoxylated cationic surfactant (col. 8, lines 8-31) (Applicants' comp G exhibiting both poor cleaning and poor protection of PET). In contrast, the sodium alkyl diphenyl oxide disulfonates (Applicants' examples 3 and 4) recited in independent claims 43 and 51 of the present specification, exhibited superior cleaning and superior protection of PET. See pages 13-17 of the present specification and Fig. 1.

Combining the sequestrants of Rossio with Man et al., fails to render claims 43 and 51 of the present application obvious.

Applicants' showing of unexpected and surprising results is sufficient to overcome a case of *prima facie* obviousness over Peters et al. and Man et al. Applicants request that the rejections should be overturned and that the application be remanded to the Examiner for further prosecution.

Respectfully Submitted,

Vidas, Arnett & Steinkrans, P.A.


Lisa L. Ryan-Lindquist
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Date: June 26, 2006